[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND ANOTHER; Ex parte ELLIS.

Industrial Arbitration (Cth.) — Waterside worker — Registration — Cancellation — Appeal—Hearing—"Judicial proceedings before the court"—Representation by officer of union—Refusal by judge—Mandamus—Stevedoring Industry Act 1949 (*No.* 39 *of* 1949), *ss.* 24, 25, 50 (3)—*Conciliation and Arbitration Act* 1904-1952 (*No.* 13 *of* 1904—*No.* 34 *of* 1952), *ss.* 32, 46.*

The hearing by the Court of Conciliation and Arbitration of an appeal under s. 25 of the *Stevedoring Industry Act* 1949, against the cancellation of a waterside worker's registration under Pt. III of that Act does not fall within the words "judicial proceedings before the court" in s. 46 (3) of the *Conciliation and Arbitration Act* 1904-1952.

The circumstances in which a writ of mandamus will be directed to the Court of Conciliation and Arbitration discussed.

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1953. SYDNEY, *Nov.* 18, 19; *Dec.* 15, 16;

1954. MELBOURNE, *March* 4.

Dixon C.J., Williams, Webb, Kitto and Taylor JJ.

MANDAMUS.

Upon an application made on behalf of William Henry Ellis, of Redfern, New South Wales, waterside worker, *Kitto* J. granted, on 19th October 1953, an order nisi for a writ of mandamus directed to the Commonwealth Court of Conciliation and Arbitration and to *Wright* J., a judge thereof, commanding them to hear and determine according to law the appeal of the prosecutor, Ellis, then pending in the Commonwealth Court of Conciliation and Arbitration against the decision of the Australian Stevedoring Industry Board given on 8th June 1953 for the cancellation of Ellis' registration as a waterside worker under the provisions of

* The provisions of s. 46 of the *Conciliation and Arbitration Act* are set out in the judgment of *Dixon* C.J. at p. 62 (*post*).

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the *Stevedoring Industry Act* 1949, as amended, and on the hearing of that appeal to allow Ellis to be represented by an officer of the Waterside Workers' Federation of Australia, upon the ground that that appeal was not a judicial proceeding before the Commonwealth Court of Conciliation and Arbitration within the meaning of s. 46 of the *Conciliation and Arbitration Act* 1904-1952.

The order to show cause came on for hearing before the Full Court of the High Court.

P. D. Phillips Q.C. (with him *C. I. Menhennitt*), by leave, for the Attorney-General of the Commonwealth, on a preliminary objection. This is not a matter for a mandamus. There was not any failure to perform any duty. Whether the judge was right or not in what he decided there really cannot be any debate that this was the very thing he was required to do, and if he did it erroneously it cannot be defective performance. [He referred to *President and Members of the Court of Arbitration (W.A.)* v. *Nicholson* (1); 47 L.Q.R. 557, 583.] In *certiorari*, and probably in prohibition, there was a very wide area for considering error. Unless it be want of jurisdiction no occasion arises for mandamus at all. It is therefore more important to distinguish between error and want of jurisdiction. When the matter arises on mandamus it becomes vital to determine whether the question decided is not mere error, for which certiorari would go, but mere error for which mandamus would not go. A survey of the history of certiorari for error appears in *R.* v. *Northumberland Compensation Appeal Tribunal*; *Ex parte Shaw* (2). The kind of matter to be determined is whether this issue of audience and the conduct of the proceedings is a matter of the kind which would lead to vitiating error completely whatever the result.

[KITTO J. referred to *Reg.* v. *Assessment Committee of St. Mary Abbotts, Kensington* (3).]

The submission in respect of that case is that if a tribunal refuses to hear the parties when it is under a duty to hear them, then it is not performing its duty. [He referred to *Ex parte Redgrave*; *Re Bennett* (4).]

[DIXON C.J. referred to *Ex parte Hebburn Ltd.*; *Re Kearsley Shire Council* (5).]

(1) (1906) 4 C.L.R. 362, at pp. 368, 370, 373.
(2) (1951) 1 All E.R. 268; (1952) All E.R. 122.
(3) (1891) 1 Q.B. 378.
(4) (1945) 46 S.R. (N.S.W.) 122, at p. 124; 63 W.N. 31, at p. 32.
(5) (1947) 47 S.R. (N.S.W.) 416, at p. 420; 64 W.N. 107, at p. 109.

An analogy as to what are jurisdictional facts in other cases may be found in *R.* v. *Commissioner of Patents* ; *Ex parte Weiss* (1).

S. Isaacs Q.C. (with him *F. W. Paterson*), for the prosecutor. Although the court below has to determine a preliminary question under s. 46, it is not empowered to determine it conclusively. A mandamus should be granted for the performance of a public duty, that is, to hear a particular officer. The duty must be spelt out of s. 46. The right is of a quasi public nature. It is a particular right in the particular individual. It does not matter whether the tribunal is a judicial tribunal or some other form of tribunal, but the question arises from its being a tribunal. The duty is to give effect. The only question that is committed to the tribunal for its conclusive consideration is a question of fact. If it is a question of mixed fact and law then, in so far as the question of fact is determined by it it may be conclusive, but if it wrongly decides the question of law, that is not conclusive. It was for the tribunal to determine, if the question arose, whether the person was a member or officer of the organization as a question of fact. *Nicholson's Case* (2) turned upon the privative section. The only jurisdiction that the Court in that case examined was whether it had jurisdiction to determine as a question of fact whether the particular person was an agent or not (*Nicholson's Case* (3)). The reference to *R.* v. *Assessment Committee of St. Mary Abbotts, Kensington* (4) shows that where a person has a clear statutory right to appear, the matter is not a matter for the tribunal to determine, but it is a matter as to which, if the tribunal determines it erroneously, mandamus will go. The preliminary objection should be overruled.

P. D. Phillips Q.C., in reply on the preliminary objection.

DIXON C.J. The Court prefers the course of reserving judgment on this point and then of putting the case in the list again, if it is found necessary, for the purpose of having the other question argued.

The parties will be informed before judgment is delivered what they are to be expected to do on it.

Cur. adv. vult.

(1) (1939) 61 C.L.R. 240, at pp. 249, 255.
(2) (1906) 4 C.L.R. 362.
(3) (1906) 4 C.L.R., at p. 370.
(4) (1891) 1 Q.B. 378.

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Dec. 15.

On 10th December 1953 the Registrar informed the parties that the Court thought it desirable to give them an opportunity of submitting argument, if they so desired, on the question whether the proceedings before the Court of Conciliation and Arbitration under s. 25 of the *Stevedoring Industry Act* 1949 were judicial within the meaning of s. 46 (3) of the *Conciliation and Arbitration Act* 1904-1952, and that the matter would be placed in the list on Tuesday, 15th December 1953, to be mentioned and, if necessary, argued.

DIXON C.J. In this case we have given some consideration to the question which has been argued, but we came to the conclusion that we were not able to dispose of the matter, in the first instance at all events, upon that ground. I have asked *Williams* J. if he would be good enough to be a member of the Court in case the matter had to be re-argued. The attitude of the parties to the other question of judicial proceedings has not been stated to the Court. We do not know whether Mr. *Phillips* intends to maintain that the subject proceedings were judicial proceedings.

P. D. Phillips Q.C. I do. An important and far-reaching question of principle arises.

DIXON C.J. The matter will be re-argued.

S. Isaacs Q.C. The question is whether an appeal under s. 25 of the *Stevedoring Industry Act* 1949 is a judicial proceeding within the meaning of s. 46 (3) of the *Conciliation and Arbitration Act* 1904-1952. The judge below said he was not convinced that the circumstances in this case justified his departure from the practice of the Court concerning representation: see pronouncement in *Eagers Service Pty. Ltd.* v. *McGregor* (1). Two views of the meaning of the expression "judicial proceedings" under s. 46 (3) are put forward: that it means (i) proceedings in which the judicial power of the Commonwealth is exercised, and (ii) any proceedings in which the court proceeds to act judicially. In *Timber Merchants & Sawmillers Association* v. *Building Workers Industrial Union of Australia* (2) it was held that a "judicial proceeding" in s. 46 (3) meant a proceeding where the court was exercising the judicial power of the Commonwealth. In those proceedings the court must act judicially. The rule does not apply to those proceedings before bodies which, though not courts, nevertheless are required to act judicially. Section 46 (3) does not have that meaning, it applies only

(1) (1951) 72 C.A.R. 1.

(2) (1948) 61 C.A.R. 128, at p. 133.

to the case where the tribunal is a court properly so termed, exercising the judicial power of the Commonwealth. The Court of Conciliation and Arbitration is bound to act judicially in all proceedings. If the expression "judicial proceeding" in sub-s. (3) of s. 46 were given any meaning other than proceedings in which the judicial power of the Commonwealth was used, sub-s. (2) of s. 46 could not be given a sensible interpretation. Even in arbitral proceedings the court must act judicially, e.g., notice to parties, opportunity of being heard, natural justice, but that is not what sub-s. (3) means. Section 25 of the *Stevedoring Industry Act* 1949 does not involve the exercise of judicial power, for the reasons that: (i) the court does not determine any controversy between subjects or between parties as litigants; (ii) the function of the court under s. 25 is purely administrative; (iii) the court's function is purely to determine a matter of future status in relation to this subject, and it is only concerned with a future course of conduct; and (iv) the court, by implication, is exonerated from applying all considerations of law and equity in relation to its determinations: see *Moses* v. *Parker*; *Ex parte Moses* (1). Under (i) the proceedings are not proceedings between parties as litigants. The Australian Stevedoring Industry Board is not a party to an appeal under s. 25. There is a complete change of procedure in s. 24 of the *Stevedoring Industry Act* 1949 from that which existed in s. 30 of the *Stevedoring Industry Act* 1947. The present Act does not provide for a complaint by an individual, nor a complaint by the board. The registrations of persons upon the register is similar to the matter or registration of organizations under the *Conciliation and Arbitration Act*. Here, as in *Consolidated Press Ltd.* v. *Australian Journalists' Association* (2): see also *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (3). The granting or taking away of status are not judicial acts. It is a question of licence or qualification to be upon the register. A decision terminating a licence is not a decision on a matter of right: it is part of the administrative function and does not involve any judicial function. The decision does not determine any past or present rights: it only determines a future course of conduct. "Judicial power" was discussed in *Rola Co. (Aust.) Pty. Ltd.* v. *The Commonwealth* (4). None of the functions of the court exercised under s. 25 of the 1949 Act measures up to the standards required by those principles which indicated the limits or principles of judicial power. The court has the same power as the board under s. 24 and is also free

(1) (1896) A.C. 245.
(2) (1947) 73 C.L.R. 549, at pp. 559, 563, 564.
(3) (1925) 36 C.L.R. 442, at p. 453.
(4) (1944) 69 C.L.R. 185, at pp. 203, 210.

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of all rules of law or equity: see *Moses* v. *Parker*; *Ex parte Moses* (1). The court can act upon its own information and its own observations, and there are not any principles of law or rules of equity, or rules of evidence whereby the court's proceedings are in any way hedged or restricted. The board exercises a completely unfettered type of control over proceedings. The proceedings before the court under s. 25 are not judicial proceedings and the judge was in error in holding that they were.

P. D. Phillips Q.C. None of the four grounds on which it was suggested on behalf of the prosecutor that this was not judicial power can be sustained. The fact that the power of the board to de-register is an administrative power does not necessarily lead to the conclusion that the same power exercised by the court on appeal is administrative. The power of the board may be administrative and the power of the Court performing the same functions on appeal may be judicial (*Medical Board of Victoria* v. *Meyer* (2); *Federal Commissioner of Taxation* v. *Munro* (3); cf. *National Telephone Co. Ltd.* v. *Postmaster-General* (4)). The point of imposing the appeal over the administrative process, is to add the protection of the judicature to correct the errors of administration (*Medical Board of Victoria* v. *Meyer* (5)). Where a class of work is dependent upon satisfying qualifications and being registered and where a person may lose his livelihood by the removal of his name from the register, the recognized manner in which our law-making systems deal with that situation is to hand the matter over in the first instance to an administrative body, but to protect both the process of admission and removal by providing for an appeal to a court which exercises again all the functions of the original body: see *Ex parte Wachstatter*; *Re the Dental Board (N.S.W.)* (6); *Rosendorff* v. *Dental Board (Vict.)* (7). When these discretionary powers are granted to a court the power is a genuine judicial power: *R.* v. *Commissioner of Patents*; *Ex parte Weiss* (8). There are various situations in patent law and trade mark legislation in which an appeal to a court is recognized and which show that the court then exercises judicial power: see also *Federal Commissioner of Taxation* v. *Munro* (9). The other position is shown in *Penton* v. *Australian Journalists' Association* (10) and *Thornton* v. *Mackay* (11).

(1) (1896) A.C. 245.
(2) (1937) 58 C.L.R. 62, at pp. 71, 90-93.
(3) (1926) 38 C.L.R. 153, at pp. 174, 181.
(4) (1913) A.C. 546.
(5) (1937) 58 C.L.R., at p. 93.
(6) (1940) 57 W.N. (N.S.W.) 69.
(7) (1949) V.L.R. 274, at pp. 276, 277.
(8) (1939) 61 C.L.R., at pp. 255, 258.
(9) (1926) 38 C.L.R., at p. 178.
(10) (1947) 73 C.L.R. 549.
(11) (1946) 56 C.A.R. 561.

There is not any inconsistency between *Penton's Case* (1) on the one hand and *Medical Board of Victoria* v. *Meyer* (2) on the other. *Meyer's Case* (2) was the case where the Court supervised the right to work of a doctor, and that was judicial power. *Penton's Case* (1) and the *Seamen's Case* (3) were cases where the Court supervised the continuance of an administrative function in an elaborate system, and that was held to be administrative. This is not a case in which mandamus should go because this is a matter given to the court to decide and is not a jurisdictional question. In any event this is a matter which is removed from the scope of this Court by reason of s. 32. These were judicial proceedings and the judge was right in the decision which he made. The order should be discharged.

[DIXON C.J. referred to the following cases relating to mandamus: *Reg.* v. *Spooner* (4); *Bookham* v. *Potter* (5); *Reg.* v. *Registrar of Greenwich County Court* (6); *Reg.* v. *Judge of County Court of Oxfordshire* (7); *R.* v. *Commissioner of Patents*; *Ex parte Weiss* (8); *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union, Australian Section* (9).]

The decision in *Reg.* v. *Assessment Committee of St. Mary Abbotts, Kensington* (10) was a decision that the tribunal had refused to undertake its duty. That has very little bearing on a case where a court must make a preliminary decision in order to determine how it will decide the right of audience.

S. Isaacs Q.C., in reply.

Cur. adv. vult.

March 4.

The following written judgments were delivered:—

DIXON C.J. The prosecutor upon this order nisi for a prerogative writ of mandamus is a waterside worker who was registered under Pt. III of the *Stevedoring Industry Act* 1949. A delegate of the Australian Stevedoring Industry Board appointed, it is to be presumed, under s. 12 of the Act held an inquiry for the purposes of s. 24 and subsequently the prosecutor was notified that his registration had been cancelled. From the decision cancelling his registration the prosecutor appealed pursuant to s. 25 to the Court of Conciliation and Arbitration. Upon the hearing of the appeal the Industrial Officer of the Waterside Workers' Federation of

(1) (1947) 73 C.L.R. 549.
(2) (1937) 58 C.L.R. 62.
(3) (1925) 36 C.L.R. 442.
(4) (1868) 18 L.T. N.S. 325.
(5) (1868) L.R. 3 C.P. 490.
(6) (1885) 15 Q.B.D. 54.
(7) (1894) 2 Q.B. 440.
(8) (1939) 61 C.L.R., at p. 253.
(9) (1951) 82 C.L.R. 208.
(10) (1891) 1 Q.B. 378.

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Australia, an organization of employees registered under the *Conciliation and Arbitration Act* 1904-1952, sought leave to appear for the prosecutor, who is a member of that organization.

The learned judge exercising the jurisdiction of the Court of Conciliation and Arbitration in pursuance of the *Stevedoring Industry Act* declined to allow the prosecutor to be represented in that manner upon his appeal. The prosecutor claims that according to the true meaning and application of the legislation the learned judge was under a duty to allow him to be represented by an officer of the organization of which he is a member and he obtained the present order nisi for a mandamus directing the learned judge to do so.

The tenor of the writ sought directs him to hear and determine according to law the appeal of the prosecutor and on the hearing of the appeal to allow the prosecutor to be represented by an officer of the Waterside Workers' Federation. Section 46 of the *Conciliation and Arbitration Act* 1904-1952 regulates the representation of parties and it is upon that provision that the correctness of the ruling of the learned judge depends. Section 50 (3) of the *Stevedoring Industry Act* enacts that the provisions of s. 46 of the *Conciliation and Arbitration Act* shall extend to proceedings before the Court under the *Stevedoring Industry Act*.

Section 46 is as follows :—" (1) In any proceedings before the Court or a Conciliation Commissioner—(*a*) an organization may be represented by a member or officer of that organization ; and (*b*) a party (not being an organization) may be represented by—(i) an employee of that party ; or (ii) a member or officer of an organization of which that party is a member. (2) In proceedings before the Court or a Conciliation Commissioner, a party shall not, except by leave of the Court or the Conciliation Commissioner, as the case may be, be represented by counsel, solicitor or paid agent. (3) This section shall not apply to judicial proceedings before the Court ".

The ruling of the learned judge, which he based upon a decision or direction of the Full Court of Conciliation and Arbitration, was that the appeal given by s. 25 of the *Stevedoring Industry Act* is a " judicial proceeding before the Court " within the meaning of sub-s. (3) of s. 46 so that s. 46 does not apply.

The question does not appear to me necessarily to involve any constitutional matter. It depends primarily upon what s. 46 (3) means by the words " judicial proceedings before the Court ". That expression, I think, is intended to mark the distinction between matters before the court exercising the authority of an industrial

tribunal and proceedings under the provisions of the Act giving it a jurisdiction as a court of law for the enforcement of certain duties and liabilities imposed by law or certain rights conferred by law. Some examples of provisions of the latter description are to be found in s. 16 (2) and (3), s. 28, s. 29A, s. 59 and s. 119. I should not have thought that the appeal under s. 25 of the *Stevedoring Industry Act* was of this kind or involved a judicial proceeding within the meaning of s. 46 (3) of the *Conciliation and Arbitration Act*. The so-called appeal entitles the waterside worker to a review of the action of an administrative body by the Court of Conciliation and Arbitration exercising a special authority under the *Stevedoring Industry Act* 1949. Once the board has satisfied itself that one or other of the conditions specified in pars. (*a*) to (*e*) of sub-s. (1) of s. 24 of the latter Act has been fulfilled, then a very full discretion arises allowing the board to cancel or suspend the waterside worker's registration or not to do so as the board thinks fit. It is an administrative discretion although no doubt to be exercised in a judicial manner. For s. 24 gives a quasi judicial power affecting the rights of individuals. But the considerations governing the exercise of the discretion are not defined or expressly limited. Of course the board cannot act upon grounds which go outside the purposes for which it was intrusted with authority to cancel or suspend registration and those purposes must be ascertained from the scope and object of the Act. When an appeal is made under s. 25 I think that the Court of Conciliation and Arbitration as a revisory tribunal is placed in the same position as the board : it must be satisfied of the existence of one or other of the preliminary conditions stated in pars. (*a*) to (*e*) of s. 24 (1) ; thereupon the same discretion arises in the court. It must be remembered that the chief functions of the Court of Conciliation and Arbitration are industrial. The case is not like that of a statutory provision creating an appeal to one of the ordinary courts of justice from an administrative decision. The character of the court as part of the regular system of courts of law may in such a case lead to a restrictive interpretation being placed on the provision, as, for example, was done in *McCartney* v. *Victorian Railways Commissioners* (1) per *Mann* J. ; see the same case in this Court (2). But in the case of the Court of Conciliation and Arbitration it is more natural to interpret such an appeal as designed to give a right of resort to an authoritative industrial tribunal for a complete reconsideration of the action taken by the administrative body but in the exercise of like powers and for the same purposes. I do not

(1) (1935) V.L.R. 51, at pp. 62-63. (2) (1935) 52 C.L.R., at p. 388.

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think that sub-s. (3) of s. 46 of the *Conciliation and Arbitration Act* 1904-1952 applied to the prosecutor's " appeal " so as to exclude the operation of sub-ss. (1) and (2) on the ground that it was a judicial proceeding before the court.

But it does not follow from this conclusion that the learned judge's view to the contrary should be corrected by mandamus. That appears to me to depend upon the question how s. 46 should be regarded. Should it be regarded as a provision to be administered and enforced by the Court of Conciliation and Arbitration so that the duty of that court is to decide what is its operation in any given case and ascertain the facts and the law for the purpose as an incident in the performance of its functions ? Or on the other hand should it be regarded as imposing an imperative duty correctly to give effect to the section as it applies to the facts of the given case, and as conferring a corresponding right on the party independent of any decision, determination or ruling of the Court of Conciliation and Arbitration and enforceable by mandamus against that court ?

If it has the former character, then the learned judge has performed his judicial duty by hearing and deciding the application by the Industrial Officer for leave to appear for the present prosecutor. If the latter be the character of the section, then the ruling of the learned judge would have the very opposite effect, that is, assuming the view I have expressed to be right, namely, that an appeal under s. 25 is not a judicial proceeding before the court. For it would then amount to a refusal to fulfil his duty of allowing the now prosecutor to be represented by the Industrial Officer of his organization.

To enable this Court to award the mandamus sought it must appear that the prosecutor obtained under s. 46 a right ascertainable, not by the Court of Conciliation and Arbitration, but independently of that court, which therefore was powerless to do more when the difficulty arose than give a direction *de bene esse*. Doubtless s. 46 " entitles " a party in cases to which it applies to be represented as the section provides. But every right or title must be enforced or administered in some forum. Is not the assumption of s. 46 that the Court of Conciliation is the forum ? Mandamus goes to compel the performance of a duty, not simply to enforce a right. Lord *Ellenborough's* compendious statement in *R.* v. *Archbishop of Canterbury* (1), shows how this remedy for the right is addressed to the duty :—" this Court, in the exercise of its authority to grant the writ of mandamus, will render it as far as

(1) (1812) 15 East 117 [104 E.R. 789].

it can the suppletory means of substantial justice in every case where there is no other specific legal remedy for a legal right; and will provide as effectually as it can that others exercise their duty wherever the subject-matter is properly within its control" (1). "But the writ of mandamus is a high prerogative writ, and is confined to cases of a public nature": *R.* v. *London Assurance Co.* (2). "The Court never grant this writ except for public purposes, and to compel the performance of public duties": *R.* v. *The Governor and Company of the Bank of England* (3).

The measure, therefore, of the public duty under s. 46 of the Court of Conciliation and Arbitration is the measure of the prosecutor's right to the writ. Is the Court of Conciliation and Arbitration under any other duty than to decide judicially upon the meaning and application of s. 46 to the given case? Is s. 46 to be administered and effectuated elsewhere than in that court? To put it in another way is the right conferred by s. 46 conferred as a right enforceable by the Court of Conciliation and Arbitration or against the Court of Conciliation and Arbitration? Upon this question as upon the scope and effect of s. 25 of the *Stevedoring Industry Act* 1949 a most important consideration is the special nature of that court, its dual character, and the policies disclosed by the *Conciliation and Arbitration Act* of furnishing it with a simple and flexible procedure of which it is to be master and giving conclusiveness and finality to its determinations whether they are or are not consistent with the provisions of the Act. It may be said broadly that the general tendency of the Act is to place the Court of Conciliation and Arbitration at the head of a closed system. In terms s. 32 gives conclusive effect to and protects the judgments, orders and awards of the Court. Unlike the parallel provision on which the decision perhaps turned in *President and Members of the Court of Arbitration (W.A.)* v. *Nicholson* (4), s. 32 does not use the word "proceedings" and for that reason the decision is not definitely in point. But on almost the same question the *Industrial Conciliation and Arbitration Act* 1902 (W.A.) was there construed as leaving the whole matter to the Industrial Court. There is no real similarity to the case of rights of audience or rights to appear by solicitors or authorized agents in inferior courts forming part of the ordinary judicial system. Apparently in England the special statutory

(1) (1812) 15 East, at p. 136 [104 E.R., at p. 796].
(2) (1822) 5 B. & Ald. 899, at p. 901 [106 E.R. 1420, at p. 1421].
(3) (1819) 2 B. & Ald. 620, at p. 622 [106 E.R. 492, at p. 493].
(4) (1906) 4 C.L.R. 362.

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remedy given in lieu of mandamus by s. 43 of 19 & 20 Vict. c. 108 to compel a county court judge "to do any act relating to the duties of his office" has been treated *sub silentio* as applicable to an erroneous refusal to allow persons entitled to appear to do so, although perhaps no actual order of the kind has been made: cf. *Reg.* v. *Spooner* (1); *Ex parte Rogers* (2); *Reg.* v. *Registrar of Greenwich County Court* (3); *Reg.* v. *Judge of County Court of Oxfordshire* (4). Apparently the provision was assumed to give a supervisory and corrective power proper to be used to ensure that the County Court gave effect to the provisions entitling either practitioners to appear or parties to be represented. Even in these cases it seems to have been treated as evident that the facts were for the County Court to decide. I cannot see how on the application of s. 46 a distinction can be made between the decision of the Court of Conciliation and Arbitration on matters of fact and on matters of law.

The present application depends upon the interpretation of s. 46 and the intention to be ascribed to it. The section must be interpreted in the context of the Act as a whole and the policies it exhibits. It would, as it seems to me, be contrary to the whole spirit and intendment of the Act to interpret s. 46 as imposing upon the Court a duty except its duty to administer that provision in the exercise of its jurisdiction to decide the matters before it whether incidental and procedural or substantive. The Court of Conciliation and Arbitration is no longer an inferior court, a matter it may be remarked tending to support and not detract from the interpretation I place upon s. 46. But otherwise the case in my opinion falls within the following proposition laid down by *A. L. Smith* L.J., though in a somewhat different case: *Reg.* v. *Justices of London* (5): "The rule is this. When an inferior court hears and determines a matter within its jurisdiction, however erroneously it may decide, either the law or the facts therein, no mandamus will go, the reason being that the Court of Queen's Bench has no prerogative to decide by way of appeal matters decided by an inferior court within its jurisdiction" (6).

I think that the order nisi should be discharged.

WILLIAMS J. I agree with the reasons for judgment of the Chief Justice. In my opinion the order nisi should be discharged.

(1) (1868) 18 L.T. N.S. 325.
(2) (1868) L.R. 3 C.P. 490.
(3) (1885) 15 Q.B.D. 54.
(4) (1894) 2 Q.B. 440.
(5) (1895) 1 Q.B. 616.
(6) (1895) 1 Q.B., at p. 637.

WEBB J. If *Wright* J. had only administrative jurisdiction mandamus would ordinarily go, as he refused to do his duty to hear the prosecutor by his union agent. But I cannot see why it should be refused simply because his Honour mistook the nature of the proceedings. That mistake did not improve the quality of his action to the extent of preventing a failure of duty on his part. Failure of duty arising from mistake appears to me to have no special immunity. The fact is that, under a misapprehension that he was discharging judicial and not administrative functions, he failed in his duty to hear the prosecutor's union agent. That duty was, I think, a public duty, having regard to the subject matter of the legislation and to the form in which s. 46 of the *Conciliation and Arbitration Act* 1904-1952 is cast.

In my opinion his Honour's duty was not discharged simply by his entering upon the determination of the nature of the proceedings and making a wrong determination. Before a judge can properly discharge his duty in a particular jurisdiction he has to realize that he is acting in that jurisdiction. Had his Honour realized he was exercising administrative functions he would have heard the union agent. It was because he failed to realize this that he refused to hear the agent. Actually his Honour gave no consideration to the question of hearing the agent, apart from determining the nature of the proceeding before him.

Now this was an administrative proceeding before the board and the appeal did not make it a judicial proceeding. As to this I agree with the reasons for judgment of the Chief Justice. It would have been otherwise if *Wright* J. had no administrative jurisdiction. The cases dealing with medical practitioners de-registered by the Medical Board and appealing to the Supreme Court, upon which Mr. *Phillips* strongly relies, are, in my opinion, inapplicable. Certainly the proceedings before the Medical Board were administrative, but the appeal was given to a purely judicial body which, unlike *Wright* J., did not have administrative jurisdiction, except to make general rules of court.

Section 75 (v.) of the Commonwealth Constitution still applies to members of the Arbitration Court, s. 17 (3) of the *Conciliation and Arbitration Act* notwithstanding. At all events that is not questioned in these proceedings. But I am satisfied that there is no need for a mandamus, as *Wright* J. can confidently be expected to act on this Court's opinion and to decide to hear the union agent. It would be different if his Honour could have bound and had bound himself by an irrevocable order against hearing the union agent.

I would discharge the order nisi for mandamus.

H. C. OF A. 1953-1954.

THE QUEEN v. THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE ELLIS.

KITTO J. I agree with the Chief Justice in holding that the hearing of an appeal under s. 25 of the *Stevedoring Industry Act* 1949 (Cth.) against the cancellation of a waterside worker's registration under Pt. II of that Act does not fall within the words "judicial proceedings before the Court" in s. 46 (3) of the *Conciliation and Arbitration Act* 1904-1952 (Cth.). I cannot usefully add anything to his Honour's reasons for so holding.

This answers in the manner desired by the prosecutor the question which the proceedings were designed to resolve. Whether in the circumstances mandamus should go is a question in which neither the prosecutor nor the respondents have more than an academic interest, and I see no necessity to form a concluded opinion upon it. The appeal before the learned judge of the Arbitration Court stands adjourned pending this Court's decision as to whether or not s. 46 applies, and one may be quite sure that when his Honour resumes the hearing he will be guided by the decision we give upon s. 46 and will proceed to hear the appeal according to law whether commanded to do so or not. In the circumstances I am content to join in discharging the order nisi. At the same time I should make it clear that, as at present advised, I should be disposed to think that the language of s. 46 places upon the Arbitration Court a positive duty to allow a party to proceedings before it to be represented in accordance with the section, except where the proceedings are in truth judicial proceedings—not except where they are considered by the Arbitration Court to be judicial proceedings.

Before parting with the case I desire to refer to the fact that the argument addressed to the Court by counsel for the Commonwealth, to whom leave to intervene had been granted, was directed, as he frankly conceded towards the end of the case, to questions which were of general importance but in which the Commonwealth had no specific interest of its own. It seems desirable to repeat some words concerning interventions by leave, which one might have expected would command general acceptance:—"I think we should be careful to allow arguments only in support of some right, authority or other legal title set up by the party intervening. Normally parties, and parties alone, appear in litigation. But, by a very special practice, the intervention of the States and the Commonwealth as persons interested has been permitted by the discretion of the Court in matters which arise under the Constitution. The discretion to permit appearances by counsel is a very wide one; but I think we would be wise to exercise it by allowing only those to be heard who wish to maintain some particular right, power or immunity in which they are concerned,

and not merely to intervene to contend for what they consider to be a desirable state of the general law under the Constitution without regard to the diminution or enlargement of the powers which as States or as Commonwealth they may exercise " (*Australian Railways Union* v. *Victorian Railways Commissioners*, per *Dixon* J. (1)).

If this view be accepted, as I believe it should be, the corollary must follow that leave to intervene, when granted, ought not to be interpreted as a general licence to discuss every interesting question in the case but should be acknowledged as limited to the submission of an argument *pro interesse suo*.

I agree in the discharge of the order nisi.

TAYLOR J. I am in agreement with the reasons of the Chief Justice in this matter and I have nothing to add.

Order nisi discharged.

Solicitors for the prosecutor, *C. Jollie Smith & Co.*

Solicitor for the respondents and the Attorney-General of the Commonwealth, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.

(1) (1930) 44 C.L.R. 319, at p. 331.